enviromental effects. Congress was broad in discussing land use matters, etc. but narrow, and did not speak of environmental matters, concerns, etc. but limited.

Extensive rules to protect preemption of local rules, especially based on public opinion on safety matters.

Best to define what "indirectly" does not mean. It does not include RFI, since FDA said Commission's limits could cause death - and that the FCC limits do not address this issue. It would be contrary to Due Process, 5th Amendment protection of persons, for the FCC to preempt regulations of those health and safety regulations designed to prevent death and other adverse health and safety effects which the FDA and others have documented, and which the FDA has told the Commission that its limits do not pertain to these effects. If the Commission's limits do not pertain to effects that can cause death, then regulating for these effects are not within the Commission's jurisdiction at the moment, and so it cannot preempt regulations that do address these effects.

The FCC states its rules pertain to effects with a threshold at or above 4 W/kg in the range this quantity applies, and for which protection is provided by its rules. Accordingly, the "direct" and "indirect" effects, are only those to which protection is provided by FCC rules. It would be contrary to Due Process, health and safety, 5th amendment, to issue preemptory rules which knowingly did not offer protection from certain effects, yet it is shown such adverse effects exist.

N.1 Commission states with respect to its new rules on exposure limits that,

"The basis for these limits, as well as the basis for the 1982 ANSI (American National Standards Institute) limits that the Commission previously specified in our rules, is an SAR (specific absorption rate) *limit of 4 watts per kilogram."* [FCC Rule and Order 96-326, paragraph 3]

N.2 However, federal health agencies in their communications with the Commission on the matter of the Commission's radio frequency emission rules [FCC ET Docket 93-62, and FCC Rule and Order 96-326] have reported there are reports suggesting potentially adverse effects below this level, and these communications justify state and local jurisdictions seeking ways to mitigate effects and which would be compatible with federal requirements. For example,

(1) In November 9, 1993, Margo Oge, Environmental Protection Agency ("EPA") Director, Office of Radiation and Indoor Air, wrote the Commission concerning the Institute of Electrical and Electronic Engineers RF safety standard IEEE C95.1-1991 standard (adopted by the ANSI in 1992). This standard (as well as that adopted by the Commission) has a hazard threshold of an SAR of 4 watts per kilogram of body weight and claims that below its maximum permissible exposure limits *"a person may be exposed without harmful effect"* [IEEE C95.1-1991 page 10]. This claim, M.Oge wrote, is *"unwarranted because the adverse effects level in the 1992 ANSI/IEEE standard is based on a thermal effect."* [page 3 of M. Oge letter in Commission ET Docket 93-62]. Yet, the Commission ignored the advice of EPA and chose to make IEEE C95.1-1991 effective in its entirety from August 1996 at least through August 1997 for Part 24 Personal Communication Services. In the Comments included with the M.Oge letter is the observations that there were reports of effects at exposures below the Commission hazard threshold of 4 watts per kilogram and where such reports suggested *"potentially adverse health effects (cancer) may exist"* and references reports of increased cancer risk by Szmigielski (Biolectromagnetics, 1982) and Chou et al. (Bioelectromagnetics 1992). It is interesting to note that the above Szmigelski paper was among the Final List of Papers Reviewed for IEEE C95.1-1991, which only included papers that met the high standard IEEE required of papers to be suitable for standard setting. The study by Chou et al.(1992) was noted in Report #86 of the National Council of Radiation Protection and Measurements ("NCRP") upon which the Commission chose to be the main basis for its exposure limits. In NCRP Section 17.6.2, Considerations For Future Criteria, it is noted that at exposure levels 1/10th of the hazard threshold of the Commission that there was over a 3 fold increase in the incidence of primary malignant tumors.

(2) Also, the National Institutes of Occupational Health ("NIOSH") wrote the Commission concerning the adoption of a standard based on a hazard threshold of 4 watts per kilogram (which is the hazard level of the Commission's present and new rules) that,

"The exposure levels that would be set by the standard are based on only one mechanism - adverse health effects caused by body heating. Nonthermal biological effects have been

reported in some studies and research continues in this area [NCRP 1986, WHO, 1993]. The standard should note that other health effects may be associated with RF exposure and that exposure should be minimized." [January 11, 1994 letter of R. Niemier, NIOSH to the Commission, in ET-Docket 93-62]

(3) The International Radiation Protection Association, in its 1988 radio frequency safety standard which is based upon the same hazard threshold of 4 watts per kilogram and the same safety factors advised,

"In view of our limited knowledge on thresholds for all biological effects, unnecessary exposure should be minimized." [IRPA, 1988, Additional considerations section]

(4) The Food and Drug Administration ("FDA") reviewed the IEEE C95.1-1991 RF safety standard (which the Commission has adopted for Personal Communications base stations and made effective August 1996 [FCC Rule and Order 96-326, Appendix C: Final Rules §1.1307 (b)(4)(ii)] and the FDA gave its comments to the Commission in its letter of November 10, 1993, and stated,

"In our opinion, it is unclear what types of biological effects and exposure conditions are addressed by this standard. For example, very few research studies of long-term low-level exposures of animals were included in the scientific rationale for the standard, despite the existence of animal studies that suggest an association between chronic low level exposures and acceleration of cancer development. Other studies have been published since finalization of the standard that strengthen this concern." [FDA letter of Lillian J. Gill, Interim Director, Office of Science and Technology, Center for Devices and Radiological Health, Nov. 10, 1993 to the Commission, ET-D0cket 93-62]

Therefore, states and local jurisdictions may seek ways to mitigate exposure based on the reports above that advise keeping exposure as low as reasonably achievable, and which address effects which the Commissions limits do not address.

O. Per FCC 97-303, para. #139- If an action is based only partly on matters on which the FCC can preempt, then it is wrong for the Commission to preempt parts of decisions, but rather it

should exclude parts of justifications for decisions as the result of its actions, and then let the courts decide what they find is within their jurisdiction..

P. Per FCC 97-303, para #141- Private entities are not government entities. If private parties agree amongst themselves not to lease space for personal wireless services that is their right. For the FCC to act otherwise would violate 5th amendment and constitute a 'taking' of property. State and local regulations permit private parties to chose or not to lease their property -they cannot be forced to do so.

Q. Commission procedures for reviewing state and local jurisdiction regulations for possible violation of 47 U.S.C. 332(c)(7)(B)(iv), will also need to check to be sure that by preempting such regulations the Commission does not violate Constitutional or other Federal statutes including:

- Americans with Disabilities Act: as permissible levels may cause death due to failure of medical devices, such as wheel chairs, used by disabled persons, and may cause malfunction of hearing aids by persons disabled due to being hard of hearing.

- Such interference may also violate the Civil rights of the above and other persons who may be adversely affected by low levels of RF exposure.

States may have regulations, permit testimony in proceedings, and collect information to assure there is no violation of the 5th or 14th amendments including providing for due process and to prohibit the allowing of a 'taking' in a Constitutional sense.

Q.1 As noted in the Ad Association Ex Parte June 10, 1997 submission in ET-Docket 93-62, the Telecommunications Act of 1996 may have properly delegated responsibilities to the Commission, the Commission must assure that its RF exposure limits do not provide a basis for a reasonable scientific based fear which could thereby affect the uses of property and constitute a 'taking' of that property as so require a court to stay the preemption authority of the Commission. Consider the following:

"the Court as well decided long ago that 'taking' included destruction or severe impairment of use [Pumpelly v. Green Bay Co. 13 Wall. (80 U.S) 166, 177-178 (1872), Welch v. Swasey, 214 U.S. 91],

and it now holds that,

"property is taken in the constitutional sense when inroads are make upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time." [United States v. Dickinson, 331 U.S. 745, 748 (1947)].

Consider various Supreme Court and Federal Appeals Court rulings on the "taking" of property. The Supreme Court has ruled that owners of adjacent land deserved compensation because *"noise, glare, and fear of injury"* and other impacts resulted in the adjacent land becoming unfit *"for the use to which the owners had applied it."* [see United States v Causby et al 328 U.S.256, and see Griggs v Allegheny County 369 U.S. 84 because of perceived "noise, vibrations and danger"], and ruled,

"While Congress may legalize, within the sphere of its jurisdiction, what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance of such a character as to amount in effect to a taking of private property for public use,"

and compensation is due under the 5th Amendment. Richards v Washington Terminal Co. 233 U.S. 546.

Hence, because the record in the proceeding ET-Docket 93-62, and in particular the Ad-Hoc Petition and ex parte submissions, there are justifiable, reasonable, science-based evidence for a reasonable person to be anxious about being exposed to RF at levels considered 'safe' by the Commission, such anxiety can make such property, "unfit for the use to which the owners had applied it" in the Constitutional sense described above.

Evidence that such feelings exist which can impair the functioning of a property is found in a policy statement by the New Zealand Ministry of Education and which was included in the Exhibits of the Ad-Hoc Association FCC 96-326 Petition.. The statement notes, "concerns were expressed by some members of the general public and some boards of trustees and parents about the safety of cell phone transmitters on school sites. Then after noting such exposures are within limits of the standards, the policy notes,

"However, of paramount importance to the Ministry is the provision of an environment where boards of trustees, parents, teachers, and pupils and other occupants of the school site can feel comfortable. For this reason the Ministry has decided cellphone transmitters will not be sited on Crown owned school sites in the future."

Likewise, in November 1995, the California Public Utilities Commission, noted it found "no scientific evidence of a definite link between cellular facility EMF exposure and adverse health

readily penetrate residences as well as the bodies and brains of its occupants. The Ad-Hoc Association has given evidence of cellular phone signals 1/12th of the exposure level considered 'safe' by the Commission which has influenced the amount of REM sleep of adults in a controlled laboratory setting; it has also given evidence which has been replicated and confirmed by different investigators at different laboratories of other biological effects of RF exposures used as a therapeutic regime to affect sleep at levels deemed 'safe' by the Commission[38a,b,c,d,e].

Therefore, States and local jurisdictions may establish moratoria to assure they are not exposing the population to allow what otherwise could be an invasion of the bodies and minds of persons in their homes which violates the 4th amendment right of persons to be secure in their homes and persons.

7. Congress has not explicitly preempted state or local "operation" or regulation of "placement, construction, and modification" for the purpose of protecting public safety and welfare

It has been noted that *"Congress does not cavalierly preempt all state law causes of action."* [Medtronic, Inc. v. Lohr, U.S. 116 C.Ct. 2240, 2250 (1996)]. Also, *"there is a strong presumption that Congress must affirmatively oust or divest state courts of jurisdiction over a federal claim"* [Grotemeyer v. Lake Shore Petro Corp. 235 Ill. App. 3d 314 (1st Dist. 1992].

Consider that *"Congress can assert exclusive power either by explicit statuary language or by regulating matter in such detail as to leave no room for state involvement."* [U.S.C.A. Const.Art. 6.cl 2] However, we see above that not only have the courts found that the Commission does not have peremptory authority regarding health and safety matters [noted in item 3.5.1 as per Verb v. Motorola and per Wright v. Motorola], but that in Sec. 253 of the TCA, Congress explicitly gave authority to the states to regulate for the purpose to *"protect the public safety and welfare."*

The above is further reason NOT to presume "operation" has been preempted.

Q.4. A specific authority given to states overrides a general preemption by the Commission. The courts have found that even if there is a general preemption authority given to a federal agency, if nevertheless Congress gives a specific authority to states then there is no preemption. Consider State of Calif. v. Tahoe Regional Planning Agency, there the courts stated,

"and even if statute preempted and precluded state jurisdiction to prevent navigational hazards, Congress approved compact which established jurisdiction of Tahoe Regional Planning Agency." [State of California v. Tahoe Regional Planning Agency, 664 F.Supp. 1373 (E.D. Cal. 1986]

So to in our case, even if Congress may have given the Commission general authority in Sec. 704 to preempt state and local regulations of personal wireless services due to the general environmental effects of radiofrequency emissions, Congress nevertheless explicitly gave states in Sec. 253(b) the authority to regulate Commission facilities to *"protect public safety and welfare."* Accordingly, just as with State of California v. Tahoe Regional Planning Agency, so to here the specific authority given to states to regulate health and safety overrides any general preemption authority given to the Commission and which did not mention health and safety matters.

R. Further comments on items already mentioned:

R.1 One of the key problems with relying upon the Commission's rules for exclusion from a routine evalaution, is that for the multiple site case, the Commission has yet to provide a means of knowing what are all of the transmitters in an area that need to be considered. With transmitters being hid in church steeples, trees, street light fixtures, bill boards, it is becoming almost impossible for anyone to know where the transmitters are, without making actual measurements in an area - and even then for reasons noted above, the levels measured will almost certainly not be 'worst case' (e..g not consider power when it rains or corner reflections.

Therefore, the Commision must maintain a listing of every single site on a computer data base so operators, jurisdictions, and the public will know where the transmitters are - this is the beginning point for any Commission assurance that asserted protections are provided.

Moreover, to assure worker RF health and safety protection, it is not enough to check just once at the beginning of a permit process. Rather period checking is needed to assure appropriate workplace practices that assure safety continue.

R.2 To assure all interested parties are made aware, notices of all requests to the Commission should appear in Federal Register and in a manner so that actions in different geographic areas can

be easily identifeid. Moreover, all filing dates should be based upon date of notice in the Federal Register. This will help assure all interested persons have the opportunity to be legally notified. Because community groups to which a jurisdiction is responsible is affected, due process and public interest in this matter requires full notice to the public - and at minimum this should be via the Federal Register..

R.3 Further comments on defining 'any person adversely affected.' Case law precedents are being set with each review and will affect future Commission decisions. Therefore, the public in general who consist of persons who now or in the near future may face similar review concerns, should be allowed to file as interested persons. Also, friends, relatives, investors scattered around the country who own propert in an area under review, persons already in the midst of relocating are all intersted parties who may be adversely affected.

Also, persons with hearing aids, and persons using medical devices that may be RF sensitive due to electrical interference at exposure conditions as low as 1/1000th or less of Commission limits need to be notified. Using a variety of approaches to reach the public will be the most responsible approach.

Examples of how such interference can occur, the Ad-Hoc Association has reported to the Commission, that an article written by H.Bassen, of the Food and Drug Administration reported that for a certain model of an apnea (breathing cessation) monitor, it was shown, *"that this model was extremely susceptible to interference from fields produced by mobile communications base stations up to 100 meters away, and by FM radio broadcast stations over one kilometer away."* Also, Bassen commented on ventilators that,

"Ventilators are medical devices that are used to control or assist the mechanical ventilation of a patient's lungs. These devices can be used to provide acute or chronic respiratory therapy to patients in the hospital, **in their home**, ...". Further, that, ventilators could be stopped when exposed to RF fields with electric field strengths from less than 1/2 to as low as 1/9th of that considered 'safe' by the Commission. Likewise, at field strengths allowed from Commission base station transmitters, malfunction of electrically powered wheel chairs has been documented. Thus, limits allowed for by the Commission may cause death by those using apnea machines,

ventilators, or wheel chairs. In addition Bassen noted that at levels allowed by the Commission persons with hearing aids are expected to have interference.

[in H.Bassen, "RF Interference of medical devices by mobile communications transmitters," in Mobile Communications Safety, ed. N.Kuster, Q.Balzano, J.Lin, published by Chapman & Hall, New York, 1997, pg. 65-94]. Also, regarding hearing aids, it was reported at a 1992 Dublin conference of COST (European cooperation in the field of science and technical research) that annoying interference to hearing aids due to cellar phone base station transmission levels of SM signals (near 900 MHz) occurred at about 1/10th of electric field levels considered 'safe' [see Ad-Hoc Association Petition of FCC 96-326 at page 16 and footnote 77].

Accordingly, the "field" has not be so pervasively occupied by federal health and safety agencies as to preclude states and local jurisdictions inacting their own RF health and safety standards, and it is clear that only considering electrical interference issues, there is sound evidence for expecting that states and local jurisdictions will need to study and implement measures to protect certain of its population from death due to medical device failure, and to protect the quality of life of its many residents using hearing aids.

S. Moreover, not notifiying persons using sensitive devices of the possibility of death due to malfunction would be denying such persons their civil rights, and due process. Such notification obligations even exist with regard to hearing aids. Furthemore, since costs are involved, as pointed out above, the Commission cannot make by Administrative law legal what otherwise would be considered a public nuissance and not provide a means of compensation under thte 5th and 14th amendments.

lation of the 5th or 14th amendments including providing for due process and to prohibit the allowing of a 'taking' in a Constitutional sense.

S.1 As noted in the Ad Association Ex Parte June 10, 1997 submission in ET-Docket 93-62, the Telecommunications Act of 1996 may have properly delegated responsibilities to the Commission, the Commission must assure that its RF exposure limits do not provide a basis for a reasonable scientific based fear which could thereby affect the uses of property and constitute a 'taking' of that property as so require a court to stay the preemption authority of the Commission.

Consider the following:

"the Court as well decided long ago that 'taking' included destruction or severe impairment of use [Pumpelly v. Green Bay Co. 13 Wall. (80 U.S) 166, 177-178 (1872), Welch v. Swasey, 214 U.S. 91],

and it now holds that,

"property is taken in the constitutional sense when inroads are make upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time." [United States v. Dickinson, 331 U.S. 745, 748 (1947)].

Consider various Supreme Court and Federal Appeals Court rulings on the "taking" of property. The Supreme Court has ruled that owners of adjacent land deserved compensation because *"noise, glare, and fear of injury"* and other impacts resulted in the adjacent land becoming unfit *"for the use to which the owners had applied it."* [see United States v Causby et al 328 U.S.256, and see Griggs v Allegheny County 369 U.S. 84 because of perceived "noise, vibrations and danger"], and ruled,

"While Congress may legalize, within the sphere of its jurisdiction, what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance of such a character as to amount in effect to a taking of private property for public use,"

and compensation is due under the 5th Amendment. Richards v Washington Terminal Co. 233 U.S. 546.

Hence, because the record in the proceeding ET-Docket 93-62, and in particular the Ad-Hoc Petition and ex parte submissions, there are justifiable, reasonable, science-based evidence for a reasonable person to be anxious about being exposed to RF at levels considered 'safe' by the Commission, such anxiety can make such property, "unfit for the use to which the owners had applied it" in the Constitutional sense described above.

Evidence that such feelings exist which can impair the functioning of a property is found in a policy statement by the New Zealand Ministry of Education and which was included in the Exhibits of the Ad-Hoc Association FCC 96-326 Petition.. The statement notes, "concerns were expressed by some members of the general public and some boards of trustees and parents about the safety of cell phone transmitters on school sites. Then after noting such exposures are within limits of the standards, the policy notes,

"However, of paramount importance to the Ministry is the provision of an environment where boards of trustees, parents, teachers, and pupils and other occupants of the school site

can feel comfortable. For this reason the Ministry has decided cellphone transmitters will not be sited on Crown owned school sites in the future."

Likewise, in November 1995, the California Public Utilities Commission, noted it found "no scientific evidence of a definite link between cellular facility EMF exposure and adverse health effects." [also in the Ad-Hoc Association FCC 96-326 Petition exhibits]. Yet it was convinced of the reality of public concern and a new release reported that it,

"ordered cellular utilities to identify and address public concerns about potential health problems from electromagnetic field (EMF) and radio-frequency (RF) exposure in siting and building new cellular towers. It urged cellular companies to site facilities away from schools and hospitals, and to restrict access to sites with warning signs and barriers."

Thus it is seen that two governmental bodies, the New Zealand Ministry of Education and the California Public Utilities Commission, have determined that there is sufficient public anxiety about the safety of cellular phone transmission signals as to have the effect of causing a "severe impairment of use." Accordingly, if the Commission allows levels to exceed those which would cause severe anxiety and severe concern to 'reasonable person' knowledgeable about the science based literature in the record of this proceeding or referenced, then the Commission may be 'taking' property, as well as not meeting its NEPA requirements.

Thus, States and local jurisdictions may properly institute moratoria to assure the above violations do not occur; for while Congress gave the Commission authority to regulate telecommunications facilities, it did not grant the Commission to set such conditions as would cause serve impairment of use, and cause anxiety destructive to the quality of life.

S.2 Recent court rulings have established that fear, whether or not based on environmental effects can justify property loss awards - thus states and local jurisdictions must address this issue, including study via moratoria.

Fear of radio frequency effects on health is not an environmental effect, for indeed, the Commission and the telecommunications operators state there are no environmental effects to fear.

Regarding awarding amounts for property value loss the following has been decided:

S.2.1: In Criscuola v. Power Authority of the State of New York 621 N.E. 2d 1195, 1196 (1993) the New York Court of Appeals held that the,

"[g]enuineness and proportionate dollar effect of the public's fear, while relevant, should be left to the contest between the parties market value experts, not magnified and escalated by a whole new battery of electromagnetic power engineers, scientists or medical experts."

A similar approach is followed in Florida Power and Light v. Jennings 518 So.2d 895 (Fla. 1987); San Diego Gas & Electric Co. v. Daley, 205 Cal. App.3rd 1334, 1339 (1988);

It has also been ruled that a reduction in property value due to fear of power lines is compensable if the plaintiff shows that the fear has some reasonable basis, e.g. Willsey v. Kansas City Power & Light Co. 631 P.2d. 268 (1981).

For more information see J.R. Porter, C.S. Langer, "Electromagnetic Fields,"Courts Deal With EMF's Effect on Property Values," in REAL ESTATE, Massachusetts Lawyers Weekly, February 27, 1995.

The above demonstrates the public's fear is a separate matter in law from whether or not there are real environmental effects. Accordingly, states and local jurisdictions may establish moratoria for the purpose of determining the potential for adverse effects on property values and the consequent impact on state and local jurisdiction revenues. Since the Commission and the telecommunications operators stress that there is no basis to expect adverse effects, then it must be presumed that such public fears or potential fears are not in fact based upon the environmental effects of RF emissions, and in any case, loss of property value and the possible liability of a jurisdiction for approving of a site, make a moratoria to address these matters outside of the parameters provided for in 332(c)(7)(B)(iv). Accordingly, moratoria evaluating the potential for such fear and property value loss effects are not subject to Commission preemption.

Rather, as provided for by Congress, if a party believes an unreasonable length of time has passed and that there has been a "failure to act" due to some moratoria or to some other cause, then that party should seek redress in a court of competent jurisdiction which will then determine what is just, fair and reasonable in any given specific case -and not be subject to blanket Commission preemption.

S.3 The 4th amendment provides for, *"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..."* As noted in evidence presented in this proceeding including in these comments, radio frequency signals, especially for those of the newer personal wirelesss services near 900 MHz can more readily penetrate residences as well as the bodies and brains of its occupants. The Ad-Hoc Association has given evidence of cellular phone signals 1/12th of the exposure level considered 'safe' by the Commission which has influenced the amount of REM sleep of adults in a controlled laboratory setting; it has also given evidence which has been replicated and confirmed by different investigators at different laboratories of other biological effects of RF exposures used as a therapeutic regime to affect sleep at levels deemed 'safe' by the Commission[38a,b,c,d,e].

Therefore, States and local jurisdictions may establish moratoria to assure they are not exposing the population to allow what otherwise could be an invasion of the bodies and minds of persons in their homes which violates the 4th amendment right of persons to be secure in their homes and persons.

S.5 The courts have found that even if there is a general preemption authority given to a federal agency, if nevertheless Congress gives a specific authority to states then there is no preemption. Consider State of Calif' v. Tahoe Regional Planning Agency, there the courts stated,

"and even if statute preempted and precluded state jurisdiction to prevent navigational hazards, Congress approved compact which established jurisdiction of Tahoe Regional Planning Agency." [State of California v. Tahoe Regional Planning Agency, 664 F.Supp. 1373 (E.D. Cal. 1986]

So to in our case, even if Congress may have given the Commission general authority in Sec. 704 to preempt state and local regulations of personal wireless services due to the general environmental effects of radiofrequency emissions, Congress nevertheless explicitly gave states in Sec. 253(b) the authority to regulate Commission facilities to *"protect public safety and welfare."* Accordingly, just as with State of California v. Tahoe Regional Planning Agency, so to here the specific authority given to states to regulate health and safety overrides any general preemption authority given to the Commission and which did not mention health and safety matters.

Footnotes for summary:

In addition, it has been shown that the Commissions review procedures should exclude reviewing any state or local jurisdiction regulations concerning the operation of personal wireless services facilities, especially those based upon health and safety risks, since the Commission does not have preemption authority over the "operation" of such facilities, and so must share its general authority with the states and local jurisdictions, with the requirement that their regulations may not cause the Commission's regulations to be violated. In addition, since the Commission does not have authority to preempt based upon health and safety considerations, since it was not given explicit jurisdiction in these areas, its purpose and function do not include these areas, and it does not have expertise in these areas. Accordingly, it may not preempt the placement, construction, and modification of personal wireless service facilities for bona fide health and safety reasons. Furthermore, private entity agreements cannot be preempted. The Courts should decide if there is cause for Commission preemption. Constitutional rights must be protected so not just any exposure is automatically acceptable. Many other considerations also indicate that Congress and the Constitution have placed more restrictions upon the Commission than the Commission would like. Nevertheless, the Commission must not seek to twist the statute or the Constitution.

Respectfully Submitted,

David Fichtenberg

David Fichtenberg Dated: October 9, 1997
Spokesperson for the Ad-Hoc Association of Parties Concerned About the Federal Communications Commission's Radiofrequency Health and Safety Rules et al
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Exhibits enclosed

Subscription to Comments of the

Ad-Hoc Association of Parties Concerned About the Federal Communication Commission's Radiofrequency Health and Safety Rules

being Comments to the Notice of Proposed Rulemaking regarding WT Docket 97-197 as described in FCC 97-303, with Comments due by October 9, 1997

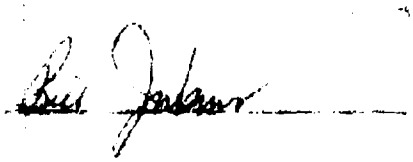
We are familiar with and subscribe to the comments to be filed by the Ad-Hoc Association of Parties Concerned About the Federal Communications Commission's Radiofrequency Health and Safety Rules et al with regard to the Federal Communication Commission Notice of Proposed Rulemaking concerning WT Docket No 97-197 in FCC 97-303.

Mr. Bill Jenkins, President,

Communication Workers of America Local 7810 AFL-CIO

PO Box 865, Olympia, Washington, 98507

In be

Signature:  **Dated October 7, 1997**

EXHIBITS

« Cellular Phone Notes »

The Cellular Telecommunications Industry Association's (CTIA) Scientific Advisory Group on Wireless Technology (SAG) has decided to defer a repeat of the Lai–Singh experiment which showed that 2.45 GHz radiation can cause single-strand DNA breaks in the brains of rats (see *MWN*, N/D94) until a SAG-approved exposure system is available. The decision was based at least in part on a review by the Harvard Center for Risk Analysis' cellular telephone advisory committee. However, the SAG appears to be ambivalent about whether to wait until a head-only exposure system is developed or until an international validation study of the comet assay used by Drs. Henry Lai and N.P. Singh is completed. In a February 8 letter to the SAG's Dr. George Carlo, the center's Dr. Susan Putnam wrote that, "The majority of the peer reviewers stated that the repetition of the [Lai–Singh study] should be deferred until an appropriate *in vivo* exposure system is developed. There was some concern expressed, however, that this would delay the program and that there was no reason to wait before beginning the replication process of the [Lai–Singh] study....The majority of the reviewers again stated that it would be prudent to wait until the international validation [was] completed before repeating the initial study. There were also several comments in disagreement with this, however. There was some concern over whether the international validation would be contributory to the issue and also concern that waiting would provide unnecessary delays to the program with little added benefit." Putnam told *Microwave News* that only six of the 11 members of the committee—Drs. Larry Anderson, Carl Durney, Saxon Graham, Asher Sheppard, Peter Valberg and Gary Williams—had responded to her request for comment, but she would not say what each had recommended. The four epidemiologists on the panel had not expressed opinions; neither had the committee's final member, Dr. Don Justesen. Since the panel was first announced last year (see *MWN*, J/A94), Dr. Philip Cole has resigned; very recently EPA's Dr. Joe Elder joined the group. The Harvard center would not release its report without Carlo's permission, and Carlo kept it confidential for six weeks. On March 23, Carlo released it as an attachment to a letter to FDA's Dr. Elizabeth Jacobson, in which he stated that, although the SAG would delay *in vivo* studies, it would release a request for proposals "within the next couple of weeks" for *in vitro* studies in "multiple laboratories." Carlo announced that, "Our goal is to have the initial *in vitro* work completed within the second quarter of this year." Mike Volpe, SAG's spokesperson, said that three labs will do the *in vitro* work: that of Dr. Martin Meltz of the University of Texas Health Sciences Center in San Antonio and two others to be selected from proposals received in response to the upcoming request. Volpe confirmed that the SAG expects to have experimental data in hand by the end of June. Carlo noted in his letter that the international validation study "may take several years" and that the *in vivo* work will begin "when the SAG's exposure system is available." In contrast to the SAG, Motorola has already initiated a repeat of the Lai–Singh *in vivo* study (see *MWN*, J/F95).

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The Los Angeles Cellular Telephone Co. (LACT) is paying the California Public Utilities Commission (PUC) $4.37 million to settle alleged violations of cellular tower siting rules. The PUC concluded that, "LACT knowingly and intentionally misled the commission by filing incorrect information," but felt that the intent behind the company's actions would be difficult to prove, according to a joint PUC–LACT statement. The settlement was also prompted by the fact that the investigation—which involved 150 LACT cell sites—would have required more than a year to litigate. The February 28 agreement gives LACT two years to bring its sites into compliance. The cellular phone company has also concluded an inquiry into an additional three sites for alleged "misrepresentation[s] to the PUC regarding construction and permitting deficiencies," with a settlement of approximately $725,000, according to Ira Alderson, an attorney with PUC's safety and enforcement division. Both settlements stem from a PUC investigation begun in 1992 to determine whether cellular companies had had the necessary state and local permits before beginning construction. "We suspected that there was a widespread practice of not following the steps required by the PUC," said Alderson. The first phase of the probe focused on LACT, the Bay Area Cellular Telephone Co. (BACT) and GTE Mobilnet of California. GTE Mobilnet was fined $343,000 for working on a site without permission and BACT was fined $2,000 for not submitting required permits to the PUC. GTE Mobilnet has appealed the decision. In the second phase, the PUC required all California cellular carriers to file detailed information regarding their compliance with siting rules. The commission is approximately halfway through this portion of the inquiry, Alderson said. Some companies, including McCaw Cellular Communications, now a subsidiary of AT&T, and Mountain Cellular, have already settled with the commission, he added. "I think that because of the investigations, cellular companies are trying to comply more," Alderson noted.

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In the latest in a series of progress reports, Dr. George Carlo and other members of the CTIA's SAG research effort briefed representatives of federal agencies at FDA's Center for Devices and Radiological Health on March 17 in Rockville, MD. After the meeting, one attendee said: "The epi work seems to be progressing, but the other studies are moving very slowly." Another commented that, "It's not only a question of speed, we don't know where they are going," adding that after the meeting, "We decided that the federal agencies needed to coordinate better." And a third attendee expressed concern that, "There isn't enough emphasis on cancer promotion studies." All those who offered their views asked for anonymity.

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U.K. defense experts have now ruled out EMI from a cellular phone as a potential cause of a helicopter crash that killed 24 top intelligence officers in Scotland last June, according to the February 5 edition of the U.K.'s *Sunday Express* (see

GOP: Voter Feedback Given to Party Moderates

Continued from A1

[illegible]

ATTENTION

The Los Angeles Cellular Telephone Company ("L.A. Cellular") has been investigated by the California Public Utilities Commission for the company's failure in some cases to comply fully with all of the Commission's rules and regulations for constructing cellular facilities. The Commission only authorizes construction of cellular facilities that have obtained all requisite permits and approvals from other government agencies.

L.A. Cellular reaffirms its commitment to providing the highest quality service throughout its service area and to complying with all federal, state and local laws, including giving the public required notice and an opportunity to be heard concerning construction of its facilities.

L.A. Cellular apologizes for any inconvenience its failure to comply fully may have caused the public authorities, L.A. Cellular's subscribers, and the public in general.

If you have any comments or concerns regarding this notice, please contact:

California Public Utilities Commission
Attn: Kent Wheatland
505 Van Ness Avenue
San Francisco, CA 94102

April 16, 1995
Los Angeles Times
pg A14

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into all facilities-based cellular carriers and their practices, operations and conduct in connection with their siting of towers, and compliance with the Commission's General Order No. 159.	I.92-01-002 (Filed January 10, 1992

INTERIM STATUS REPORT

CELLULAR SITING INVESTIGATION

Advocacy Staff
Commission Advisory
and Compliance Division
November 25, 1992

TABLE OF CONTENTS

GLOSSARY

A.L.	Advice Letter
APN	Assessor's Parcel Number
BACTC	Bay Area Cellular Telephone Company
BCTC	Bakersfield Cellular Telephone Company
CACDA	Advocacy Staff of the Commission Advisory and Compliance Division
BLM	Bureau of Land Management
CUP	Conditional Use Permit
FAA	Federal Aviation Administration
FCC	Federal Communications Commission
G.O.	General Order
LACTC	Los Angeles Cellular Telephone Company
LASLP	Los Angeles SMSA Limited Partnership
OSA	Office of the State Architect
OSHPD	Office of the State Health and Planning Department
TUP	Temporary Use Permit
USFS	United States Forest Service

RELEVANT STATUTES AND REGULATIONS

California

California Health and Safety Code § 15,000 et. seq.
California Education Code § 39,154

Federal

10 U.S.C. § 2665
40 U.S.C. § 303b
43 U.S.C. § 1732 (Federal Land Policy and Management & Retention Act of 1976)
36 Code of Federal Regulations § 251.55(d)
47 Code of Federal Regulations, Chapter 1, part 22

Other

Uniform Building Code

SUMMARY

This is an interim status report in the Cellular Siting Investigation, OII 92-01-002. The Advocacy Staff of the Commission Advisory and Compliance Division (CACDA) intends to use this report in several ways. First, it is intended to assure other regulatory agencies with delegated environmental review authority that the California Public Utilities Commission (CPUC or Commission) is taking its oversight obligations and its lead role in cellular siting seriously. This investigation has been making progress, despite the large number of sites covered. Second, having initially identified the extent of the violations it considers probable, staff is now prepared to begin some site specific discovery,[1] and address a procedural course. If this investigation assesses a site in greater detail, this status report will be superseded by a final report before hearings begin. Third, it is hoped that this report, which is based primarily on written evidence, will assist those working toward General Order (G.O.) 159 revisions in another proceeding. CACDA welcomes letter responses response to this status report, and the future participation of the public, permitting agencies, public safety officials, and cellular companies.

CACDA is very disheartened to find that the apparent violations of G. O. 159 are far more pervasive and extensive than suspected at the beginning of this investigation. For almost all sites, and based upon written evidence submitted to date, construction began days, weeks, or sometimes months prior to the effective date of the CPUC resolution authorizing construction. Only 34 sites within the scope of this partial report of 391 sites are today "clean" in that they have no apparent G.O. 159 violations.[2] Many other types of statutory, regulatory, ordinance, and general order discrepancies, as well as possible misrepresentations (in addition to those stemming from submittal of incorrect facts in advice letters under G.O. 159), have been detected. In some cases advice letters for sites were finally filed in response to the CPUC's investigation. Some of these sites had been in operation for months or years. Additional sites within the scope of the investigation have not filed any information in this investigation.

Perhaps most serious and troubling is the discovery of companies that have operated sites without the mandated regard for public

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[1] This would entail a deeper investigation into some sites, as well as pressing the companies for data already requested, but not submitted.

[2] Approximately 632 sites have filed information and are within the scope of this investigation.

safety. They have constructed sites on public school grounds without the required Office of State Architect approvals, which are designed to protect children and teachers. They have constructed sites on hospital grounds without the required Office of State Health & Planning Department approval, which insures the safety of crucial emergency facilities. They have frequently operated sites without the final building inspection approval or Certificate of Occupancy, which verifies that the building is safe and has met the local building requirements.

Even if the utilities can explain some of the apparent discrepancies in this interim status report, it is evident from the prevailing practice of cellular companies that they often neglect or delay obtaining pre-construction permits or approvals. This practice initially led the CPUC to adopt G.O. 159 and has continued. As discussed below, G.O. 159 was adopted in large part to ameliorate concerns of cellular utilities.

On January 9, 1990, the Commission instituted a rulemaking (R.90-01-012) to determine the need for rules for the siting and environmental review of cellular radiotelephone facilities. This rulemaking stated that immediate action was need to require proper environmental review prior to the construction of additional cellular facilities. According to the rulemaking, the need for environmental review outweighed the need for immediate construction of additional cellular facilities that might be constructed without such review.

This need became apparent because the cellular radiotelephone industry was expanding much faster than projected. Formal complaints were filed with the Commission alleging inadequate environmental review and requesting the removal of certain inappropriately sited cellular facilities. Cellular companies were concerned that the proposed rules superimposed two separate regulatory processes for approving cell sites: one before local authorities and one before this Commission, and that this was a wasteful and duplicative procedure that should be avoided.

According to D.90-03-080, the four objectives of G.O. 159 are for the Commission to ensure that:

1. the potential environmental impacts of all cellular sites are reviewed and considered in a manner consistent with the California Environmental Quality Act (CEQA);

2. affected local citizens, organizations, and jurisdictions are given reasonable notice and opportunities for input into the review process;

3. the public health and welfare, and zoning concerns of local jurisdiction are addressed;